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SHANKARKUMAR SANPATHKUMAR v. KETUA PENGARAH JABATAN PERHUBUNGAN PERUSAHAAN

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COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHE MOHD RUZIMA GHAZALI JCA
LIM CHONG FONG JCA
[CIVIL APPEAL NO: W-01(A)-160-03-2023]
30 APRIL 2024
[2024] CLJ JT(6)

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Abstract – *(i) Even though the main remedy claimed is that of reinstatement, a workman is not confined or restricted to that even if his employer offers him reinstatement. The workman is at liberty to decide whether to accept the said offer, with or without conditions; (ii) Section 20(3) of the Industrial Relations Act 1967, as amended by the Industrial Relations (Amendment) Act 2020, makes it mandatory for the Director General of Industrial Relations ('DGIR') to refer the representations of a workman to the Industrial Court for an award; the Minister of Human Resources plays no role in such a reference to the Industrial Court. The DGIR has no discretion but to refer to the Industrial Court when there is no settlement of a representation. The DGIR does not make any assessment as to the chances of success, or otherwise, of the workman's claim or the position that his employer has taken.*

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ADMINISTRATIVE LAW: *Judicial review – Appeal – Challenge against decision of Director General of Industrial Relations ('DGIR') – Workman found guilty of misconduct and dismissed by employer – Workman made representations to DGIR – Employer agreed to reinstate workman to former position subject to certain terms – Workman rejected reinstatement – DGIR closed representations – Whether DGIR correct in closing workman's representations without referring same to Industrial Court – Whether mandatory for DGIR to refer representations of workman to Industrial Court for award – Industrial Relations Act 1967, s. 20(1), (3) – Industrial Relations (Amendment) Act 2020 – Rules of Court 2012, O. 53*

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LABOUR LAW: *Employment – Dismissal – Reinstatement – Rejection of reinstatement – Workman found guilty of misconduct and dismissed by employer – Workman made representations to Director General of Industrial Relations ('DGIR') – Employer agreed to reinstate workman to former position subject to certain terms – Workman rejected reinstatement – DGIR closed representations – Whether DGIR correct in closing workman's representations without referring same to Industrial Court – Whether mandatory for DGIR to refer representations of workman to Industrial Court for award – Industrial Relations Act 1967, s. 20(1), (3) – Industrial Relations (Amendment) Act 2020*

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The appellant was the Senior Adjuster at the Malayan Adjustment Company Sdn Bhd ('company'). He was dismissed by the company after he was found guilty of the misconduct of lobbying for a competitor company, against the interest of the company. The appellant then made his representations to the Director General of Industrial Relations ('DGIR'), pursuant to s. 20(1) of the Industrial Relations Act 1967 ('IRA 1967'), to be reinstated to his former employment. There was no settlement but the company later agreed to reinstate the appellant subject to certain terms. The appellant rejected the reinstatement as he could not agree with the terms. The DGIR did not refer the appellant's representations to the Industrial Court and proceeded to close the file ('decision of the DGIR'). Aggrieved, the appellant applied to the High Court for a judicial review, under O. 53 of the Rules of Court 2012, seeking orders for (i) *certiorari* to quash the decision of the DGIR; and (ii) *mandamus* to compel the DGIR to refer the representations to the Industrial Court. The High Court dismissed the said application on the grounds that, *inter alia*, since the appellant refused the offer of reinstatement, there was thus no loss of benefits and privileges and, as such, there was nothing to refer to the Industrial Court. Hence, the present appeal. In support of his appeal, the appellant argued that (i) the Industrial Relations (Amendment) Act 2020 ('IRAA 2020') brought a paradigm shift, where representations for reinstatement was concerned for a dismissed workman, in that for so long as there was no settlement or likely settlement of the representations of the workman, then the DGIR has no discretion but to refer the matter to the Industrial Court; (ii) while, previously, the Minister has a discretion whether or not to refer to the Industrial Court and, in that context of the exercise of discretion, the Minister may consider if the rejection of the offer of the company to reinstate the workman with/without conditions as reasonable in the circumstances of the case, now the DGIR does not have the benefit of such discretion as the language used in the IRAA 2020, in the amended s. 20(3), was in mandatory terms.

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Whether the dismissed workman, *ie*, the appellant, was right or wrong was not a finding of fact that the DGIR had to make in the conciliation meetings; it was a matter which the workman had every right to ventilate at the Industrial Court and to be vindicated if the evidence was in his favour. At the stage of conciliation meetings, no assessment or judgment was to be made on the strength or weakness of his case and of the rightness of the company's allegation of his misconduct. Merely because the appellant had asked for the relief of reinstatement, it did not mean that he was estopped from pursuing his claim at the Industrial Court the moment the company agreed to have him reinstated and he rejected the reinstatement. Whilst a plea for reinstatement is necessary

A to engage the jurisdiction of the Industrial Court in the event there is no settlement, the moment the matter is referred to the Industrial Court, the workman's remedy is not confined to the remedy of reinstatement; a workman who considers himself to have been dismissed without just cause and excuse is perfectly entitled to avail himself of the relief or B compensation *in lieu* of reinstatement either because he has found another job or that it would not be conducive for industrial harmony for him to return to work in the company. (paras 62, 64, 68 & 69)

(2) The unamended s. 20(3) of the IRA 1967 was distinctly different from the amended one both in terms of the removal of discretion to refer from C the Minister and the reposing of the obligation to refer on the DGIR to refer the representations of the workman for reinstatement to the Industrial Court. The discretion on the part of the Minister, after notification by the DGIR of no likelihood of settlement of the representations of the workman, to refer or not to refer to the Industrial D Court as he thinks fit, had been removed completely. In its place was not the substitution of the discretion to refer or not to refer in the DGIR but, instead, an obligation on the part of the DGIR to refer if there was no likelihood of the representations being settled. For so long there is no settlement, the DGIR would have to refer the representations of the E workman to the Industrial Court. If the DGIR does not refer to the Industrial Court, in the absence of a settlement, then his decision may be quashed by the High Court and a *mandamus* may be issued to compel him to refer the dispute to the Industrial Court. (paras 18, 33 & 40)

(3) The decision of the DGIR, not to refer the representations of the F workman failing settlement to the Industrial Court for an award, ought to be set aside on the grounds of illegality and irrationality. The High Court erred in its interpretation of the amended s. 20(3) of the IRA 1967. Orders of *certiorari* and *mandamus*, to quash the decision of the DGIR and to compel the DGIR to make the reference to the Industrial G Court, respectively, were granted. (paras 87, 91 & 92)

Obiter dictum:

(1) To allow the DGIR a discretion not to refer to the Industrial Court, when for any reason there is no settlement, would be to allow him to terminate the dispute prematurely to the detriment and prejudice of the H workman. It would be retrogressive instead of progressive; it would be to denude, rather than to enhance, the rights of the workman and to provide certainty in the process of reference to the Industrial Court. (para 82)

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Case(s) referred to:

Aneka Retail (M) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors [2023] 2 CLJ 455 HC ***(refd)***

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] CLJU 156 FC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 CA ***(refd)***

Minister Of Labour & Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd [1980] CLJU 47; [1980] 1 LNS 47 FC ***(refd)***

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 6 CLJ 700 CA ***(refd)***

Sunny Khoo v. YB Menteri Sumber Manusia, Malaysia & Anor [2011] 1 CLJ 1047 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Takaful Nasional Bhd v. Nooraizan Mohd Tahir & Anor [2013] 2 CLJ 121 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 18(1), (2), 19, 20(1), (2), (3), (9), 54

Rules of Court 2012, O. 53

For the appellant - Ranjan N Chandran, VK Raj, Muthuveeramani Nadesan, Ananthan Vijayakumar & Vinintha Laksmy Mohan; M/s Hakem Arabi & Assocs

For the respondent - Khalijah Mohd Khalid; SFC & Jeevitha Raja; FC

[Editor's note: For the High Court judgment, please see Shankarkumar Sanpathkumar lwn. Ketua Pengarah Jabatan Perhubungan Perusahaan [2024] 1 ILR 494 (overruled).]

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng JCA:

[1] The Industrial Relations (Amendment) Act 2020 (Act A1615) ("IRAA 2020") save for a few sections, came into force on 1 January 2021. It introduced some major changes to the Industrial Relations Act 1967 ("IRA"). In particular, instead of a discretion vested in the Minister to refer or not to refer a representation involving a dismissed workman to the Industrial Court, there is now the mandatory requirement under s. 20(3) of the IRA for the Director General of Industrial Relations (DGIR) to refer the representations to the Industrial Court where there is no settlement or likely settlement of the representations.

[2] The appellant here had been dismissed on 20 January 2021 by his company *via* an email notification for the alleged misconduct of lobbying for the interest of a competitor. He was dismissed summarily without a domestic inquiry. His last position in the Malayan Adjustment Company Sdn Bhd was that of a Senior Adjuster. His wife who worked with him in the same company was also dismissed subsequently on 4 February 2021. He had been with the company since 4 November 2019.

[3] He made his representation under s. 20(1) of the IRA to the DGIR which representations in writing was for him to be reinstated to his former employment. Several meetings were called by the DGIR where the appellant and the company's representatives attended to try to settle the dispute. There was no settlement even though the company later agreed to reinstate the appellant but without any admission of liability on its part.

[4] The appellant was not happy with the offer to reinstate him which he understood to be subject to terms in the agreement that he had to sign. He did not sign the agreement because he could not agree to the terms of reinstatement with no apology and no admission of liability by the company and with a new line of reporting which is directly to the Managing Director of the company. He was also of the view that the company was not sincere and genuine in its offer to reinstate him since the company had initially rejected his reinstatement.

[5] The DGIR took the view that since the representation was for "reinstatement to his former employment" and since the company was prepared to have him reinstated to his former employment with the same pay and with arrears of salary being paid, the representations which could have been resolved and settled was unreasonably rejected. The DGIR, therefore, saw the representation as one that could have been settled but for the unreasonable conduct of the appellant and so he did not refer the representations to the Industrial Court. Instead he closed the file, terminated the conciliation proceedings and informed the appellant by email.

At The High Court

[6] The appellant being aggrieved by the decision of the DGIR not to refer his representation to the Industrial Court, challenged the decision in High Court by way of a judicial review application under O. 53 of the Rules of Court 2012 ("ROC 2012"), seeking an order of *certiorari* to quash the said decision of the DGIR not to refer the representations of the appellant to the Industrial Court and an order of *mandamus* to compel the DGIR to refer the representations to the Industrial Court.

[7] The High Court, in its decision on 6 June 2023, at para. [14] of its grounds of judgment ("GOJ") was of the view that since the applicant had refused the offer of reinstatement to his former employment with backwages on the same terms and conditions of employment, there was thus no loss of benefits and privileges and as such there was nothing to refer to the Industrial Court.

[8] The High Court went further to surmise that if the DGIR (previously the Minister) does refer then the exercise of his discretion may be quashed as being obviously unreasonable. See para. [14] of the GOJ.

[9] The High Court then concluded as follows:

> [15] I therefore hold that the DGIR has not committed any error of law in closing the representations by virtue of the reinstatement by the employer. I further hold that refusing the reinstatement was an unreasonable rejection by the applicant in view of the fact that he was being given back wages and returned to his original position. The fear of likelihood of victimisation by going back to his former employment is a factor irrelevant for consideration in view of the clear and unambiguous provisions of subsections 20(1), (2) and (3) of the IRA and would descend the discussion into the arena of speculation and conjecture.

[10] The application for judicial review by the workman/applicant was found to be without merits and so was dismissed with costs of RM5,000 to the respondent.

At The Court Of Appeal

[11] The applicant appealed to the Court of Appeal and the main plank of the argument was that the IRAA 2020 brought a paradigm shift where representation for reinstatement was concerned for a dismissed workman in that for so long as there was no settlement or likely settlement of the representation of the workman, then the DGIR has no discretion but to refer the matter to the Industrial Court.

[12] The appellant argued that there may be a multitude of reasons why the appellant could not agree to the terms of reinstatement to his former employment with the company and for so long as there is no settlement, the DGIR need not have to weigh and consider the reasonableness or otherwise of the settlement but that he has no discretion other than to refer the representation to the Industrial Court.

[13] Whilst previously the Minister has a discretion whether or not to refer to the Industrial Court and in that context of the exercise of discretion, the Minister may consider if the rejection of the offer by the company to reinstate the workman with or without conditions as reasonable in the circumstances of the case, now the DGIR does not have the benefit of such a discretion as the language used in the IRAA 2020 in the amended s. 20(3) is in mandatory terms.

Whether The Amendment To Section 20(3) Of The IRA By The IRAA 2020 Takes Away The Discretion Of The DGIR In That He Shall Refer The Representations Of The Dismissed Workman To The Industrial Court For So Long As There Is No Settlement

[14] The IRAA 2020 amended s. 20(2) and (3) as follows:

> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient **so that an expeditious settlement thereof is arrived at**.

A (3) Where the Director General is **satisfied that there is no likelihood of the representations being settled** under subsection (2), the Director General **shall** refer the representations to the Court for an award.

(emphasis added)

[15] In tabling the Industrial Relations (Amendment) Bill 2019 for its second B and third reading, the then Human Resources Minister, Tuan M Kulasegaran, explained as follows in the Dewan Rakyat as recorded in the Hansard at DR.9.10.2019 at p. 169 as follows:

Di samping itu, kuasa budi bicara sama ada untuk merujuk atau tidak merujuk sesuatu representasi berhubung pembuangan kerja ke Mahkamah C Perusahaan juga dimansuhkan bagi membolehkan semua kes terus dirujuk ke Mahkamah Perusahaan apabila tiada penyelesaian dicapai melalui proses perundingan damai oleh Ketua Pengarah Perhubungan Perusahaan. Ini bertujuan untuk mempercepatkan proses penyelesaian kes dan membolehkan pekerja mendapat keadilan dan hak untuk didengar di Mahkamah Perusahaan, dengan izin access to justice and the right to be D heard, juga kepada majikan.

[16] Translated into English, the explanation would read as follows:

Besides that, the discretionary power whether to refer or not to refer the representation relating to dismissal from employment to the Industrial Court has also been repealed to enable all cases to straightaway be E referred to the Industrial Court when there is no settlement reached through the process of conciliation by the Director General of Industrial Relations. This is for the purpose of expediting the process of resolution of the case and to enable the workman to receive justice and the right to be heard by the Industrial Court with the same access to justice and right to be heard being given to the employer as well. F

[17] The unamended s. 20(3) IRA was distinctly different from the amended one set out above both in terms of the removal of discretion to refer from the Minister and the reposing of the obligation to refer on the DGIR to refer the representations of the workman for reinstatement to the Industrial Court. G The unamended s. 20(3) reads as follows:

(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; **where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly**. H

(3) Upon receiving the notification of the Director General under subsection (2), **the Minister may, if he thinks fit, refer the representations to the Court for an award**.

(emphasis added)

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[18] What is therefore discernible is that the discretion on the part of the Minister, after notification by the DGIR of no likelihood of settlement of the representations of the workman, to refer or not to refer to the Industrial Court as he thinks fit, had been removed completely. In its place is not the substitution of the discretion to refer or not to refer in the DGIR but instead an obligation on the part of the DGIR to refer if there is no likelihood of the representations being settled. See the High Court case of *Aneka Retail (M) Sdn Bhd v. Mahkamah Perusahaan Malaysia & Ors* [2023] 2 CLJ 455 at paras. [18] to [19].

[19] To harness the argument that in spite of the amendment to s. 20(3) of the IRA, the DGIR still has a discretion like the Minister, before the amendment, to refer or not to refer the representations to the Industrial Court would be to do violence to the language employed and to read into the provision words not there. If Parliament had wanted the DGIR to retain the discretion, if he thinks fit, to refer or not to refer the representations of the dismissed workmen to the Industrial Court, the amendment would probably read as follows:

> (3) Where the Director General is **satisfied that there is no likelihood of the representations being settled** under subsection (2), **the Director General may, if he thinks fit**, refer the representations to the Court for an award.
>
> (emphasis added)

[20] It is a case of postulating how the amendment would look like if the discretion to refer or not to refer is still being retained, but now vested not in the Minister but in the DGIR. If s. 20(3) of the IRA had been so worded for the sake of argument, then it may be confidently argued that what has changed is the person on whom the discretion is now vested, *ie*, on the DGIR and not the Minister and that just as the Minister may think it not fit to refer to the Industrial Court a representation for reinstatement where the company had agreed to have the workman reinstated, likewise the DGIR too may exercise his discretion not to so refer.

[21] Often times, a thing becomes clearer when one explores and expresses what the thing is not. Here, it is not for the DGIR to, if he thinks fit, refer the representations to the Industrial Court for an award. It is instead required of him as the DGIR to refer the representations to the Industrial Court once there is no likelihood of a settlement of the representations. The sufficiency of the reason for not accepting the offer for reinstatement is not necessary or relevant because the referral is triggered the moment there is no likelihood of a settlement of the representations of the workman for reinstatement.

[22] What is the key here are not the reasons for no settlement but the reality of no settlement. It is not why the roadmap failed but the objective fact and reality of the failure. It is not who is responsible for the failure of a settlement but whether there was a settlement.

[23] Perhaps old habits die hard, and changes require adaptation. Be that as it may, "rules must be obeyed" as the popular band ABBA reminds us in "The Winner Takes It All"!

[24] Section 20(3) of the IRA as amended by the IRAA 2020 makes it mandatory for the DGIR to refer the representations of the workman to the Industrial Court for an award. The Minister has no role to play in such a reference to the Industrial Court. The DGIR has no discretion but to refer to the Industrial Court once there is no settlement of the representations.

Whether The True Nature Of A Conciliatory Proceeding Before The DGIR Under Section 20 Of The IRA Is Such That When There Is No Settlement, The DGIR Shall Refer The Representations Of The Dismissed Workman To The Industrial Court

[25] Whilst the word "conciliation" is not expressly used in s. 20 of the IRA with respect to the true nature of the meeting called by the DGIR or his representative to "take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at" as he is enjoined to do so under s. 20(2) of the IRA, it is certainly implied. It cannot be denied that what is expected of the DGIR is to try to get the parties to settle the dispute.

[26] Section 20 of the IRA parked under "Part VI Representations On Dismissals" comes after ss. 18 to 19 in "Part V Conciliation." Part V deals with trade disputes and the roles of the DGIR and the Minister in trying to settle the trade dispute *via* conciliation. Section 18(1) and (2) of the IRA read as follows:

Part V

CONCILIATION

Reference of disputes for conciliation

18. (1) Where a trade dispute exists or is apprehended, that dispute, if not otherwise resolved, may be reported to the Director General by:

(a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute; or

(b) a trade union of workmen which is a party to the dispute.

(2) **The Director General shall** consider any dispute reported to him under subsection (1) and **take such steps as may be necessary or expedient for promoting an expeditious settlement thereof**:

Provided that where the dispute relates to the dismissal of a workman, section 20 shall apply.

(3) Where a trade dispute exists or is apprehended, which in his opinion is not likely to be settled by negotiation between the parties, the Director General may, if he deems it necessary in the public interest, **take such steps as may be necessary or expedient for promoting a settlement thereof** whether or not the trade dispute has been reported to him.

(emphasis added)

[27] The expression used in s. 20(2) of the IRA is as follows:

(2) Upon receipt of the representations the Director General **shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at**.

(emphasis added)

[28] The expression "take such steps as may be necessary or expedient for promoting an expeditious settlement thereof" in s. 18(2) under "Part V Conciliation" is the same expression used in s. 20(2) "take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at" with only minor syntactical variations. Clearly a "conciliation" proceeding is what the Legislature has in mind in both Part V and Part VI of the IRA.

[29] The DGIR makes no finding of fact or law. The approach of the DGIR was expounded by the Federal Court in the *Minister Of Labour And Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd* [1980] CLJU 47; [1980] 1 LNS 47; [1980] 2 MLJ 248 at p. 250 RH B-I where it was held as follows:

Section 20(2) of the Act plainly *does not impose any duty on the Director General or his representative to decide or determine questions of any kind and to ascertain the law and the facts*. He is merely required to deal with the situation in the way he thinks best *to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister. Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and settle the dispute themselves. It is not a forum for discussing rights and the law. The Director-General or his representative sits in the meeting not as an adjudicator but as a mediator or, to use the word envisaged by the provisions relevant in the Act, conciliator. In such position, he is not prevented from expressing his views on any matter which arises for the benefit of either party, having regard to his experience in similar situations and industrial relations in general. Whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of facts*. The result is not his decision or determination of questions of any kind. The very fact that the Director-General is not required to notify the Minister when there is a settlement but only when there is no settlement, indicates that the result is determined by the parties and not by him. In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement ...

> The Director-General or his representative under s. 20(2) of the Act cannot be said to exercise any powers that are analytically judicial. He is merely required to make a notification of an existing fact. No doubt he has in effect to consult both parties before notifying the Minister that there has been no settlement.
>
> (emphasis added)

[30] The Federal Court could not over-emphasise that the main purpose of the s. 20(2) meetings was to conciliate the parties to a settlement. Under the then existing regime, the DGIR was merely required to notify the Minister where there is no settlement. Under the present regime introduced by the IRAA 2020, the DGIR is required to refer the dispute to the Industrial Court.

[31] Under the new regime, the DGIR, who still performs the same role, shall refer the representations of the workman to the Industrial Court. He made no finding of law or of the facts. He cannot arrogate to himself the previous role of the Minister, to decide if he thinks fit, refer the representations to the Industrial Court.

[32] The DGIR's main concern is to try to get the workman and his employer to settle the dispute. He passes no judgment on the parties. He does not have to consider the reasonableness or otherwise of either the workman's action or that of his employer in rejecting or not accepting any offer for reinstatement.

[33] The DGIR does not make an assessment as to the chances of success or otherwise of the workman's claim or the position that his employer has taken. There may be offers and counter-offers, amended and even reamended offers, with or without conditions. There may be admissions, confessions, apologies given and regrets expressed and then retracted; even recanting one's recantation! The DGIR does not have to wrestle with whether a counter-offer cancels an original offer and is a new offer altogether as we often hear. Until there is a concluded agreement, as in a consensus *ad idem* in a settlement that is recorded and signed by both the dismissed workman and his employer, there is just no settlement. In the facts before us, there was no concluded and conclusive settlement by the parties and in particular by the appellant here as the dismissed workman. For so long as there is no settlement, he would have to refer the representations of the workman to the Industrial Court.

[34] In fact, the "proceedings" before the DGIR under s. 20(2) of the IRA, being a conciliation proceeding, no evidence of what happened at that conciliation proceeding may be produced before the Industrial Court or for that matter before any other court as provided for in s. 54 of the IRA as follows:

54. Exclusion of evidence as to certain matters.

(1) Where a trade dispute relates to matters as to which *negotiation or conciliation proceedings* have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation thereto agreed to and signed by the parties to the dispute.

(2) In a proceeding before the Court on a reference to the Court under *section 20(3), no evidence shall be given of any proceeding before the Director General under section 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference*.

(3) No evidence shall be given in proceedings before the Court with regard to any offer relating to any matter connected with the trade dispute *made without prejudice by any person or trade union except with the consent of that person or trade union*.

(4) The *exclusion* specified in subsections (1), (2) and (3) shall also be *applicable in any proceedings before any other court*.

(emphasis added)

[35] The Federal Court in *Wix Corp* (*supra*) explained the true nature of a conciliation proceeding with crystal-clear clarity at p. 251 LH A-C as follows:

The use of the words "any proceeding" in the provision in reference to the steps taken by the Director-General must be taken to be in the loose and not judicial sense and must also be taken to give him the option whether or not to have such proceeding. In any case what should be noted in the provision is that *since the legislature has deemed it fit to exclude as evidence such proceeding from the Industrial Court, it should also be excluded from other courts.* This provision should indicate that *the courts should not be concerned with what transpired at the conciliation proceeding and where there is no settlement they need only concern themselves with that fact*.

(emphasis added)

[36] In *Takaful Nasional Bhd v. Nooraizan Mohd Tahir & Anor* [2013] 2 CLJ 121; [2012] MLJU 105, Ravinthran Paramaguru JC (now JCA) after quoting the above *dicta* of the Federal Court went on to explain as follows:

I agree with the learned Chairman that the aim of ensuring confidentiality of conciliation proceedings is to assure the parties that they are free to make concessions, admissions and offers to settle a case without being worried that the other side may use it to their detriment during trial. In other words, section 54 is aimed at promoting conciliation proceedings.

[37] It stands to reason that matters said and reasons given for rejecting a settlement and that would include a settlement by way of being reinstated, are meant only for the ears of the DGIR or his representative and not matters that may be referred to at the proceedings before the Industrial Court or any other court. The DGIR should only be concerned with the result of the

conciliation proceedings and not the reasons for or routes to a non-settlement. If matters said and offers and counter-offers with or without additional conditions are allowed to be adduced as evidence in the Industrial Court or any other court, no one would dare to speak at such a meeting for fear of being quoted and used against the person.

[38] It goes without saying that matters said and documents tendered during the conciliation proceedings which is in the nature of a negotiation and mediation are all on a without prejudice basis and are privileged from disclosure in the Industrial Court or any other court.

[39] That being the case, it makes every sense that when there is no settlement of the dispute, the DGIR would discharge his statutory duty by making the reference to the Industrial Court under s. 20(3) of the IRA and such a decision is generally not reviewable as a court of law cannot descend into dissecting the decision as the reasons for failing to settle cannot be disclosed and more so when it is mandatory for the DGIR to refer when there is no likelihood of a settlement.

[40] If the DGIR does not refer to the Industrial Court in the absence of a settlement, then his decision may be quashed by the High Court and a *mandamus* issued to compel him to refer the dispute to the Industrial Court.

[41] Even though the main remedy claimed is that of reinstatement, the workman is not confined or restricted to that even if his employer were to offer him reinstatement with no loss of salary and seniority and with all backwages paid. The workman is at liberty to decide whether to accept the offer of his employer for reinstatement, with or without conditions because that is the very nature of the purpose of a conciliation meeting – exploring with the parties if they could settle.

[42] We cannot read into s. 20(2) and (3) of the IRA words that are not there such as "if the workman rejects the unconditional offer for his reinstatement, then the DGIR shall close the matter and no reference shall be made to the Industrial Court." The fact that no discretion is reposed on the DGIR would mean that the DGIR is obliged and mandated to refer the workman's representations to the Industrial Court when there is no settlement for whatever reasons.

[43] Whilst under the old paradigm, the Minister may consider matters such as whether it was reasonable for the workman to reject his employer's offer for reinstatement, under the present paradigm, the Minister's role having been removed, it is not substituted therefore with a new role of the DGIR, in place of the Minister. Some cases in the past before the IRAA 2020 have suggested that if the workman unreasonably rejected his employer's offer for reinstatement, then the Minister need not refer the representations to the Industrial Court.

[44] In the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665; [1996] 1 MLJ 481, the Court of Appeal observed at p. 708 (CLJ); pp. 513 to 514 (MLJ) as follows: A

> Take the case of a workman who has admitted the commission of serious misconduct such as an assault upon his employer or a fellow employee, or to theft of his employer's property; or where, for example, the employer, after dismissing the workman, repents and reinstates or offers to reinstate him in his former employment without loss of any benefits or privileges. In all these examples, the Minister may well be within the purview of the section in declining a reference. In the last example, there is simply nothing to refer because of the reinstatement or the offer thereof. If in such a case the Minister does decide to refer, then, the exercise of his discretion may be quashed in *certiorari* proceedings as being obviously unreasonable. Reinstatement is the primary remedy in industrial law and an acceptance of it or **an unreasonable rejection of it by the workman must be treated as having put an end to the dispute** ... (emphasis added) B C

[45] In *Sunny Khoo v. YB Menteri Sumber Manusia, Malaysia & Anor* [2011] 1 CLJ 1047, Aziah Ali J (later FCJ), in applying the above principle with respect to the exercise of the Minister's discretion not to refer, said as follows: D

> [11] In the present case the applicant has refused the offer of reinstatement to his previous post with the same terms and conditions of employment. As His Lordship Gopal Sri Ram said in *Hong Leong Equipment Sdn Bhd* referred to above, if the employer reinstates or offers to reinstate the employee to his former employment without loss of any benefits or privileges, there is simply nothing to refer because of the reinstatement or the offer thereof. If the Minister does refer then the exercise of his discretion may be quashed as being obviously unreasonable. Therefore, I find that the Minister has not committed any error of law in refusing to refer the applicant's representation to the Industrial Court. There is nothing to refer. E F

[46] The very nature of a conciliatory meeting to resolve a dispute and to arrive at a settlement, if possible, is such that no blame is placed on any party with respect to why there is no settlement and the sufficiency or otherwise of the reasons for rejecting an offer for reinstatement cannot be inquired into for the purpose of a reference under s. 20(3) of the IRA which is couched in mandatory language. G

[47] With the paradigm shift brought about by the IRAA 2020, the only valid time when the DGIR need not refer the matter to the Industrial Court when there is no settlement is when the workman does not attend any of the conciliation meetings without any reasonable excuse. The representations shall be deemed to have been withdrawn. This we see in s. 20(9) of the IRA introduced by (Act A1322) which came into effect on 28 February 2008 as follows: H I

A Where a workman who has made a representation under subsection (1) attends none of the conferences under paragraph (8)(b) without any reasonable excuse, the representation shall be deemed to have been withdrawn.

[48] There may well be a host of reasons why a dismissed workman may B not want to accept reinstatement even though he had asked for it in his representation. In the present case, he was dismissed without a proper written show cause letter issued to him and was not given an opportunity to refute in writing the allegation of lobbying for the business of a competitor in encouraging a colleague to join a competitor. There was no domestic C inquiry held.

[49] The appellant narrated in his affidavit that on 19 January 2021 at 2.30pm, while he was attending to his work outside the office, he received a call from his Assistant General Manager, Mr Benjamin Roy, who asked him to return to the office. He reached the office at about 4pm and Mr D Benjamin Roy informed him that a review of all his files would be conducted the next morning.

[50] The next day on 20 January 2021 at about 9am, Mr Benjamin Roy reviewed the appellant's files, witnessed by one Mr Nelson, the Chief Operation Officer and one Mr Collin Loke, the Senior Manager. It was E during this time that the appellant also informed Mr Nelson that he was not able to open his office email since 14 January 2021. Mr Nelson ignored that complaint and after the review was completed, the appellant was asked to see the CEO, one Mr Ramakrishnan.

F **[51]** The appellant noticed four other senior officers in the CEO's room. The CEO accused the appellant that he was forcing and lobbying for one Mr Siva, the CEO of the subsidiary company, Malayan Marine Maritime Consultancy ("MIMC"), to join a competitor. When the appellant requested Mr Siva to be present to clarify the accusation, the CEO refused and instead stated that he had already decided to terminate the employment of the G appellant. According to the appellant, the CEO also informed the appellant that he does not trust the appellant anymore and that he was worried that the company's personal information would be leaked to outsiders.

[52] The appellant was dismissed rather unceremoniously. He was asked to pack his personal belongings and leave the office and that the termination H letter would be sent to him. So about 11.30am on 20 January 2021, in full view of the other staff in the company, including the appellant's wife who was working in the company, Mr Nelson accompanied the appellant to the lift lobby. The termination letter was emailed to the appellant at about 7pm on 20 January 2021.

I

[53] The appellant's wife, Ms Chiam Yek Soan, was also terminated by the company on 4 February 2021. A

[54] The appellant made his representations to the Industrial Relations Department ("IRD"), Kuala Lumpur. On 18 February 2021, the appellant emailed Mr Hairunizam bin Neemat, the respondent's officer, attaching the employment letter, termination letter and chronology of events leading to the termination of his employment. B

[55] Initially, at the virtual conciliation meeting held on 5 March 2021, the company, who was represented by Mr Nelson and two other officers, refused to entertain any reinstatement of the appellant. The appellant said he then requested for compensation of six months' salary to which Mr Hairunizam informed the appellant that he would discuss further with the company and ended the meeting. C

[56] On 10 March 2021, Mr Hairunizam informed the appellant *via* email that the company had agreed to his reinstatement. The next day, on 11 March 2021, Mr Hairunizam emailed to the appellant the memorandum of agreement ("MOA") for him to sign. D

[57] The appellant informed the respondent by email on 12 March 2021 that he was unable to accept the reinstatement offer of the company. He gave two reasons. One was that the company had earlier rejected his request to be reinstated during the conciliation meeting of 5 March 2021 and he doubted if the company was sincere in their acceptance of him to be reinstated. The second reason was that the company had not admitted any liability on its part and he was worried to return to the same office where he had been treated badly. Thus, instead of reinstatement with no admission of liability or an apology, he requested for compensation for loss of salary for six months as a settlement but the company refused what was suggested by him. E F

[58] The appellant was shocked to receive, on 25 March 2021, an email from Mr Hairunizam that the IRD decided to close the file as the company's offer of reinstatement had been rejected by him. G

[59] The appellant appealed to the respondent by his letter of 30 March 2021 that the matter be referred to the Industrial Court. The respondent replied by its letter of 2 April 2021, enclosing their letter of 18 March 2021 informing the appellant that the file was closed as the matter was deemed resolved as the offer for reinstatement had been rejected by the appellant. H

[60] It is not the business nor the domain of the DGIR to assess the reasonableness or otherwise of the rejection of reinstatement by the company. The inescapable and undisputed fact was that there was no settlement or any likelihood of a settlement and so there was nothing left for the DGIR for he has no discretion but to refer the appellant's representations to the Industrial Court. I

[61] Parliament had in its wisdom legislated that when there is no settlement of the dispute and that would include a rejection of the offer to be reinstated with payment of backwages and no loss of seniority, the only course open to the DGIR as the respondent, is to refer the dispute to the Industrial Court. The reason is not difficult to find.

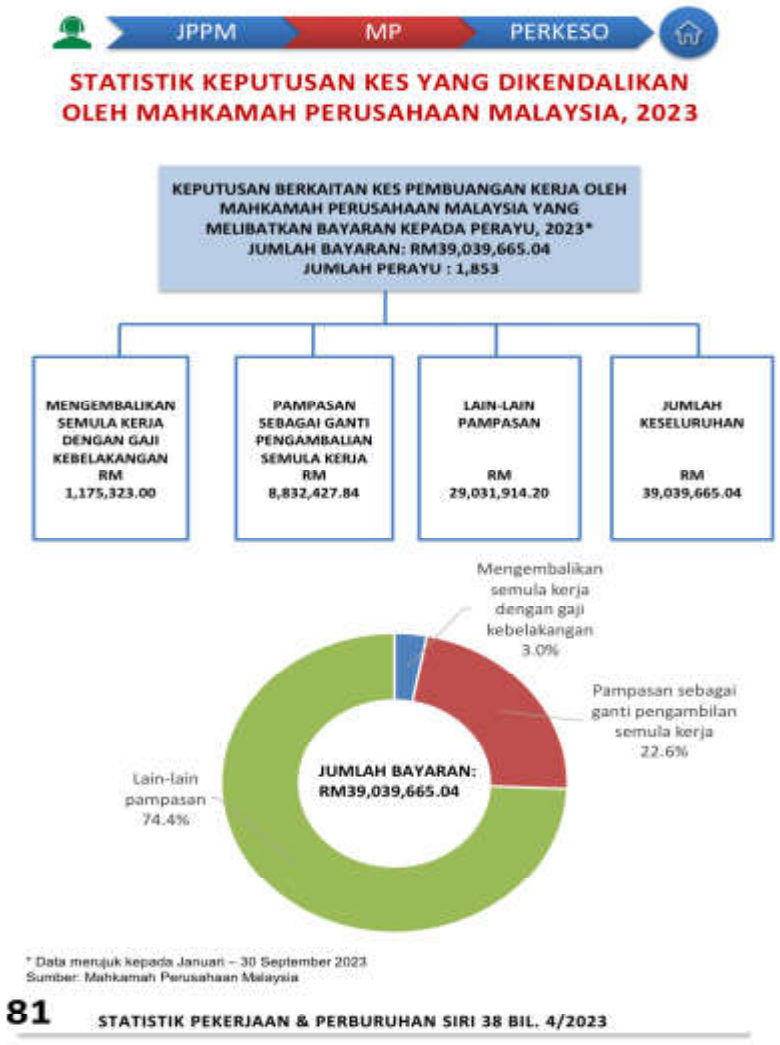
[62] An aggrieved workman may perceive that he had been roughly and unfairly dismissed from his employment and he may want to be vindicated in the Industrial Court unless the company is prepared to apologise to him or to admit its mistake in unfairly dismissing him. The dynamics of a working relationship in an employment and the standing of a dismissed workman before his colleagues and subordinates cannot simply be brushed aside. The relationship of an employer and an employee is one of mutual trust and confidence. Trust once broken or alleged to have been broken, is not easily restored. To say "sorry" may be therapeutic in healing a bruised relationship but it may be the most difficult word to say though ABBA in "The Winner Takes It All" would remind us "I apologise if it makes you feel bad."

[63] Conversely, a workman who has committed a misconduct may be appreciative of the grace and mercy extended to him by his employer. Grace in giving him what he does not deserve in reinstating him back unconditionally to his employment; mercy in sparing him of being dismissed from employment. Even if he has to say "sorry" in such a circumstance, we would gladly say it to keep his rice bowl.

[64] Whether the dismissed workman is right or wrong is not a finding of fact that the DGIR has to make in the conciliation meetings. It is a matter which the workman has every right to ventilate in the Industrial Court and to be vindicated if the evidence is in his favour. After all the operative words in s. 20(1) of the IRA to trigger the hearing of his representations by the DGIR are when the workman "considers that he has been dismissed without just cause or excuse by his employer". At this stage of conciliation meetings, no assessment or judgment is to be made on the strength or weakness of his case and of the rightness of the company's allegation of his misconduct.

[65] This court can take judicial notice of the fact that even in the majority of cases referred to the Industrial Court by the DGIR, more often than not, in cases where the Industrial Court found that there had been unlawful dismissal, the Industrial Court's awards would be for compensation *in lieu* of reinstatement rather than for reinstatement. The reason is not difficult to find: in most of the cases, it is no longer conducive for industrial harmony for the workman to be reinstated and not to mention that his position may have been occupied by some other person in the interim.

[66] In the Ministry of Human Resource's publication on "Statistik Pekerjaan Dan Perburuhan" Siri 38 Bil. 4/2023 as from January to September 2023 at p. 81, in the cases disposed of by the Industrial Court in 2023, only 3% were awarded reinstatement with backwages as reproduced below:


JPPM
MP
PERKESO
STATISTIK KEPUTUSAN KES YANG DIKENDALIKAN OLEH MAHKAMAH PERUSAHAAN MALAYSIA, 2023
KEPUTUSAN BERKAITAN KES PEMBUANGAN KERJA OLEH MAHKAMAH PERUSAHAAN MALAYSIA YANG MELIBATKAN BAYARAN KEPADA PERAYU, 2023*
JUMLAH BAYARAN: RM39,039,665.04
JUMLAH PERAYU : 1,853
MENGEMBALIKAN SEMULA KERJA DENGAN GAJI KEBELAKANGAN RM 1,175,323.00
PAMPASAN SEBAGAI GANTI PENGAMBALIAN SEMULA KERJA RM 8,832,427.84
LAIN-LAIN PAMPASAN RM 29,031,914.20
JUMLAH KESELURUHAN RM 39,039,665.04
Mengembalikan semula kerja dengan gaji kebelakangan 3.0%
Pampasan sebagai ganti pengambilan semula kerja 22.6%
Lain-lain pampasan 74.4%
JUMLAH BAYARAN: RM39,039,665.04
* Data merujuk kepada Januari – 30 September 2023
Sumber: Mahkamah Perusahaan Malaysia
81
STATISTIK PEKERJAAN & PERBURUHAN SIRI 38 BIL. 4/2023

[67] In a relatively rare case of reinstatement being ordered where the company had chosen to dismiss a workman purely because of his trade union activities, the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 at p. 778, after highlighting that there could be no clearer case of victimisation and unfair labour practice, observed as follows:

> In the circumstances of the case, we do not consider that compensation is the proper remedy. *For, otherwise, employers will be encouraged to terminate the services of their unionised workmen, confident in the expectation that all they have to face is an award of compensation – a small price to pay for being rid of trade unionists. The remedy of reinstatement is therefore the only just and proper remedy that is appropriate to meet the facts and circumstances of the present case.*
>
> ...
>
> In view of the peculiar facts of this case, we varied the order of the Judge remitting the case to the Industrial Court to the following extent:
>
> (1) all the respondents are hereby forthwith reinstated to the second appellant with no loss of seniority or benefits, monetary or otherwise;
>
> (2) all the respondents are to report for work at the premises of the second respondent at 8a.m. on 1 October 1996, and those who so fail to report shall lose the benefit of this judgment, save for the order as to costs;
>
> (3) the reinstatement need not be to identical posts as those previously held by the respondents or any of them in the first appellant, but may be to a similar or an equivalent post;
>
> (4) there shall be general liberty to both parties to apply to the High Court in the carrying out of this order.
>
> (emphasis added)

[68] We do not think that merely because the appellant had asked for the relief of reinstatement which is stated in the Form P1 that he had to fill up in making his representations to be reinstated, he is estopped from pursuing his claim in the Industrial Court the moment the company agrees to have him reinstated and he rejects that reinstatement. Whilst a plea for reinstatement is necessary to engage the jurisdiction of the Industrial Court in the event there is no settlement whether by way of returning to *status quo ante* or some other settlement *in lieu* of reinstatement, the moment the matter is referred to the Industrial Court, the workman's remedy is not confined to the remedy of reinstatement.

[69] A workman who considers himself to have been dismissed without just cause and excuse is perfectly entitled to avail himself of the relief of compensation *in lieu* of reinstatement either because he has subsequently found another job or that it would not be conducive for industrial harmony for him to return to work in the company.

[70] The Court of Appeal in *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 6 CLJ 700 addressed this issue when it observed through Ravinthran Paramaguru JCA as follows:

> [27] ... at the point of making representation to the Director General under s. 20(1), an employee who considers himself dismissed without just cause or excuse is obliged to seek "to be reinstated in his former employment". This is the only reference in the Industrial Relations Act 1967 (Revised 1976) to the remedy of reinstatement insofar as the prosecution of the claim of the employee is concerned. The other reference to the remedy of reinstatement is in respect of the power of the Industrial Court to grant the said remedy when making the award under s. 30. Therefore, it follows that once the case is referred to the Industrial Court by the Minister, there is no longer a specific requirement in the Act for the employee to plead the remedy of reinstatement. The Industrial Court Rules 1967 which governs the procedure of the Industrial Court does not impose the obligation to plead the remedy of reinstatement in the statement of case either ...

[71] Whilst the dismissed workman has to seek reinstatement to trigger the jurisdiction of the DGIR to help in getting the parties to arrive at a settlement, the workman is certainly not confined to that relief and for the purpose of settlement, he may agree to be reinstated with or without conditions or settle with some compensation *in lieu* of reinstatement, and failing which the DGIR shall refer the dispute to the Industrial Court.

[72] There is no good reason to confine the workman to the relief of reinstatement if he has his reasonable grounds to want to have his day in the Industrial Court, especially when he believes that he has not committed any misconduct and the company, in offering to reinstate him is not prepared to admit its wrongful termination of the workman. Being a piece of social legislation, the dismissed workman must be given every opportunity to ventilate his claim in the Industrial Court especially when he seeks the court's vindication in his stand that he had not committed any misconduct that would justify dismissal.

[73] The conciliation proceedings before the DGIR must not be used to constrain the workman to accept the offer of reinstatement if he does not want to accept it. The DGIR, who unlike the Minister, has no discretion but to refer to the Industrial Court, which would make findings of law and of fact in arriving at its award.

[74] Again, in the *Sanbos*' case (*supra*), the Court of Appeal explained as follows:

> [29] *... the only relief envisaged in s. 20(1) at the inceptive representation stage is the remedy of reinstatement. But s. 30(6) empowers the Industrial Court to include in the award "any matter or thing which it thinks necessary or expedient". Hence, even if reinstatement was pleaded and asked for, the Industrial Court is not restricted*

A *to the said relief*. As we pointed out, there is no statutory obligation to plead or ask for reinstatement before the Industrial Court. In the premises, the Industrial Court cannot be said to commit an error of law if it grants monetary relief when reinstatement was not pleaded or asked for. Therefore, the question of the Industrial Court ceasing to possess "substantive" jurisdiction cannot arise.

B (emphasis added)

[75] Any lingering doubt as to the jurisdiction of the Industrial Court upon a reference by the DGIR has now been put to rest with the recent Court of Appeal case of *ACE Holdings Bhd v. Norahayu Rahmad & Anor* [2023] 6 CLJ 159; [2023] 4 MLJ 768 where Wong Kian Kheong JCA reiterated as follows:

C [23] ... according to the *ratio decidendi* (*Sanbos*) if the Minister has referred a workman's representation to the Industrial Court (IC), the IC cannot dismiss the workman's claim without hearing the claim on the sole ground that the IC ceases to have jurisdiction to decide the claim merely because the workman's SOC has not applied for a reinstatement remedy.

D ...

[30]....we take this opportunity to state that any previous High Court decision or the IC award which is contrary to the *ratio decidendi* (*Sanbos*), is now overruled by the *ratio decidendi* (*Sanbos*).

E **[76]** There is no good reason to deprive a workman of wanting the Industrial Court to hear his claim for dismissal without just cause and excuse and of vindicating him in the award and if so vindicated to be awarded either reinstatement or if not conducive for industrial harmony, then compensation *in lieu* of reinstatement and backwages.

F **[77]** An offer to reinstate made by the company at the conciliation stage may not come with an apology or an admission of liability or wrongdoing on the part of the company and a workman is entitled to refuse the offer of reinstatement in a situation like this where his dignity and worth as well as pride has been seriously dented and damaged.

G **[78]** It would be difficult for a company to say sorry or express regret over its action of wrongfully dismissing a workman for fear that other workman may be emboldened to challenge the company in the future. If that be the case, then the company must be prepared to show at the Industrial Court that its dismissal of the workman was for a just cause and excuse and it behoves H the DGIR to refer the representations to the Industrial Court.

[79] A piece of social legislation, like the IRA, designed to protect the more vulnerable party for whose interest the Act was passed and later the IRAA 2020, must be interpreted in a manner that would promote the purpose of the Act in ensuring that the rights of a workman are not ridden I roughshod over.

[80] A social legislation designed to give a workman more compensation than the common law would afford him, cannot on the ground of the workman unjustifiably rejecting the company's offer to reinstate him, take away his right to have the Industrial Court hear his claim and instead suffer his file being closed by the DGIR and his representations reduced to nothingness there.

[81] Whilst the representations and request to be "reinstated to his former employment" is the "open sesame" for the DGIR to assume jurisdiction to try to get the parties to settle the dispute, it need not end there with that settlement for settlement may take many sizes, shapes and shades. The workman is not obliged to settle by way of being "reinstated to his former employment" and no assessment or judgment will be passed on him but that he will have the chance to have the Industrial Court to hear the dispute.

[82] To allow the DGIR a discretion not to refer to the Industrial Court, when for any reason, there is no settlement, would be to allow him to terminate the dispute prematurely to the detriment and prejudice of the workman. It would be retrogressive instead of progressive; it would be to denude rather than to enhance the rights of the workman and to provide certainty in the process of reference to the Industrial Court.

[83] Parliament, with the passage of time and the benefit of past experience, had found it necessary to take away the discretion of the Minister to refer or not to refer a dismissed workman's representations to the Industrial Court so as to enhance the protection afforded to the dismissed workman. The DGIR is now statutorily required to refer the representations to the Industrial Court failing settlement. Instead of an option, it is now an obligation. This consistent approach of Parliament to protect and promote the rights of the more vulnerable in our nation's workforce was echoed by Gopal Sri Ram JCA (later FCJ) in *Hong Leong Equipment Sdn Bhd* (*supra*) at p. 704 (CLJ); p. 510 (MLJ) as follows:

> The section [s. 20] is obviously a remedial provision, housed in an Act that is itself a piece of *beneficent social legislation*. It should, therefore, based on the rule in *Heydon*'s case receive a broad and liberal interpretation. It cannot be gainsaid that Parliament intended to elevate the status of a workman as defined in the Act from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. *It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save, and except, for just cause or excuse. Due recognition of this higher status must therefore be accorded by our courts if they are to act in obedience to the will of Parliament*.

A Employment as a fundamental right

Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Pt II of the Federal Constitution. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and the cases cited therein. The reasons for the B view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

The desire of Parliament to protect the nation's workforce from the C harshness of an unbending and inveterate common law and doctrines of equity, as expressed by the passing of the Act, may thus be seen to be entirely in harmony with the terms of the supreme law of the Federation. The high standards of social justice so carefully established by the legislature and by the framers of the Federal Constitution ought not, in my judgment, to be consciously lowered by any decision of this court. (emphasis added)

D

[84] We can do no better than to resound the significant and substantial benefit that s. 20 of the IRA was designed to deliver to a workman dismissed unlawfully by referencing the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] CLJU 156; [1980] 1 LNS 156; [1981] E 1 MLJ 238 at p. 239, where Raja Azlan Shah CJ (Malaya) (as HRH then was) observed as follows:

In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, *eg*, a summary dismissal where the workman has not F committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer.

G ...

Reinstatement, a statutorily recognised form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.

H

[85] The representations to be "reinstated to his former employment" does not have to end there and if it does not in that there is no settlement for whatever reasons, there is open to him a whole wide vista of reliefs that the Industrial Court may award him if he succeeds. Thus, it was said in *Sanbos*' case (*supra*) as follows:

I

[26] ... it must be noted that 'reinstatement' is not the only reason for a dismissed employee to make representation to the Director General under s. 20(1) of the Industrial Relations Act 1967 (Revised 1976) with a view

of having his case referred to the Industrial Court. **He may avail more generous damages in the form of compensation and back wages from the Industrial Court as compared to what he can get under common law.**

(emphasis added)

[86] With respect, the DGIR had misconceived his powers under s. 20(3) of the IRA in exercising his discretion not to refer to the Industrial Court the representations of the workman which was not settled. When brought under the searchlight of judicial review, we find that the decision of the DGIR not to refer has the effect of frustrating the purpose of the amendment introduced by the IRAA 2020 with respect to s. 20(2) and (3) of the IRA, to facilitate reference to the Industrial Court. With the greatest of respect, the DGIR, by the exercise of his perceived discretion, had placed a barrier in the path of the dismissed workman from seeking his reliefs in the Industrial Court. The dismissed workman in the appellant now faces an obstacle when there is none as it had been removed by the IRAA 2020.

[87] The DGIR's decision not to refer the representations of the workman, failing settlement, to the Industrial Court for an award, ought to be set aside on the grounds of illegality and irrationality as expounded in the Federal Court's decision of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, where Edgar Joseph Jr FCJ explained the grounds of judicial review as follows with respect to "illegality" and "irrationality" at p. 173 (CLJ); p. 187 (MLJ):

Lord Diplock's first ground for challenge, namely, 'illegality', involves insisting that the authority or body whose decision is being impugned has kept **strictly within the perimeters of their powers** ...

(emphasis added)

[88] As for "irrationality", the Federal Court observed at p. 173 (CLJ); p. 188 (MLJ) that:

Lord Diplock's second ground for challenge, namely, 'irrationality' recognises a different route whereby the substance of a decision may be reviewed by the courts ... In the words of Lord Diplock, 'a decision which is **so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'**.

(emphasis added)

[89] Where a decision-maker misconstrues the terms of any relevant statute or misapplies or misstates a principle of the general law, he is said to have committed an error of law and his decision is amenable to judicial review as was held by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 at p. 768 as follows:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that **an error of law would be**

A **disclosed if** the decision maker asks himself the wrong question or takes into account irrelevant considerations (what may be conveniently sermed an *Anisminic* error) or if **he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law**.

Since an inferior tribunal has no jurisdiction to make an error of law, its B decisions will not be immunized from judicial review by an ouster clause however widely drafted.

(emphasis added)

[90] The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ C 65; [1999] 3 MLJ 1 at p. 101 (CLJ); p. 45 (MLJ) pronounced authoritatively as follows:

In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, *etc* ' kind, judicial review will lie to impeach all errors of law D made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School* (*ibid*) at p. 70, ... **no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it**.

(emphasis added)

E

Decision

[91] We are therefore of the considered view that the High Court had erred in its interpretation of the amended s. 20(3) of the IRA which was clearly crafted to take away the discretion of the DGIR when there is no likelihood F of a settlement under s. 20(2) of the IRA in a s. 20(1) of the IRA representations by a dismissed workman but to refer the dispute to the Industrial Court as required under s. 20(3) of the IRA.

[92] The decision of the DGIR in not referring the representations that could not be settled to the Industrial Court was irrational and illegal in the G circumstances of the case and we grant an order of *certiorari* to quash the decision and a *mandamus* to compel the DGIR to make the reference to the Industrial Court.

[93] We therefore allowed the appeal and set aside the order of the High Court. We exercised our discretion and made no order as to costs.

H

I